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ABSTRACT

This report compares and contrasts Federal court decisions invclving student dress codes, with special emphasis on Denver area cases. Discussion covers code enforcement, subsequent court battles, relevant constitutional issues, and First Amendment and procedural and substantive due process considerations. The report includes the official statements by the National Association of Secondary School Principals and the ACLU on personal appearance. (JF)

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SCHOOL DRESS CODE VIOLATIONS AND THE ENSUING CONTROVERSY.

I. INTRODUCTION.

IT HAS BEEN DIFFICULT FOR SCHOOL ADMINISTRATORS, LAWYERS AND THE COURTS TO FIND A HANDLE FOR THIS PROBLEM, AND I SUPPOSE THAT IS NOT TOO SURPRISING BECAUSE, REGARDLESS OF HOW HARD YOU TRY TO BE OBJECTIVE, THE BUILT-IN BIAS OF PERSONAL TASTE IS ALWAYS PRESENT.

EXCEPT IN CERTAIN TROPICAL CLIMES, IT HAS BEEN NECESSARY FOR MAN (AND, FOR THAT MATTER, WOMAN) TO COVER HIMSELF WITH SOME KIND OF WRAP TO KEEP WARM, AND EXCEPT FOR CERTAIN TYPES OF NIGHT CLUBS, IT HAS BEEN SOCIALLY UNACCEPTABLE TO APPEAR IN PUBLIC WITHOUT CLOTHING.

CLOTHING IS ALSO USED FOR IDENTIFICATION IN SOME CASES, AND THE OBVIOUS IS THE MILITARY UNIFORM. THAT BECOMES PARTICULARLY RELEVANT IN CLOSE COMBAT SITUATIONS WHERE IT IS NECESSARY TO DETERMINE AT A GLANCE WHETHER A PERSON IS FRIEND OR FOE.

ONE OF MY COLLEGE ENGLISH PROFESSORS ONCE MADE A STATEMENT TO OUR CLASS THAT HE IDENTIFIED THE MEMBERS OF HIS CLASS BY THE TYPE OF CLOTHING THAT THEY HABITUALLY WORE. HE SAID THAT IF WE WERE TO APPEAR SOME MORNING WITHOUT ANY CLOTHING, HE WOULD NOT BE ABLE TO IDENTIFY US. WELL, WE DID NOT PULL A SURPRISE QUIZ ON HIM, SO HE NEVER HAD AN OPPORTUNITY TO TEST

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THAT HYPOTHESIS. OF COURSE, HE WAS USING THIS ILLUSTRATION IN THE CONTEXT OF DISCUSSING WRITING STYLE; BUT, NEVERTHELESS, I BELIEVE THERE IS SOME TRUTH IN WHAT HE SAID. THOSE OF YOU WHO HAVE EVER TAKEN A PHYSICAL FOR MILITARY SERVICE WILL PROBABLY AGREE!

ANOTHER FACTOR THAT MAKES THIS AREA OF THE LAW DIFFICULT IS RAPIDLY CHANGING CLOTHING STYLES THESE DAYS. DRESS LENGTHS CURRENTLY HAVE CAUSED A GREAT DEAL OF TRAUMA. TO GO DIRECTLY FROM THE "MINI" TO THE "MAXI", AND SOMETIMES BOTH AT THE SAME TIME, IS WHAT I CALL A DRASTIC CHANGE. DRESS DESIGNERS PROBABLY PLANNED IT THAT WAY IN ORDER TO SELL THE IDEA OF THE "MIDDIE" KNOWING THAT WE WOULD BE RECEPTIVE TO THE GOOD OLD AMERICAN TRADITION OF COMPROMISE. OF COURSE, WHAT THEY OVERLOOK IS THE FACT THAT SOME "MINIS" ARE SO SHORT THAT THEY, ALONE, OFTEN RESULT IN A COMPROMISE OF A DIFFERENT KIND.

THE PURPOSE OF MOST SCHOOL DRESS CODES IS TO AVOID THE SOMETIMES REAL AND SOMETIMES IMAGINED DISRUPTIVE EFFECT OF EXTREMES IN PUPIL APPEARANCE, ON THE THEORY THAT ROUGH DRESS ENCOURAGES ROUGH CONDUCT. ONE IS MORE RELUCTANT TO GET INVOLVED IN ALTERCATIONS WHEN HE IS WEARING HIS BEST DRESS THAN WHEN HE IS CASUALLY DRESSED. THEREFORE, IT IS IMPORTANT THAT DRESS CODES BE CURRENT AND BE RE-EVALUATED PERIODICALLY. SOMETIMES CONTEMPORARY STYLES GET AHEAD OF THESE REVISIONS, AND THIS HAS ECONOMIC IMPACT WHICH MAKES ENFORCEMENT MORE

DIFFICULT. TAKE THE EXAMPLE OF THE PARENT WHO HAS SPENT A LOT OF MONEY ON MINI SKIRTS FOR HIS CHILDREN--AND THEY ARE SHORTER THAN PERMITTED BY THE SCHOOL DRESS CODE. WHAT'S A DAD TO DO? YOU CAN'T LENGTHEN A MINI, AND THE PARENT IS LEFT WITH THE CHOICE OF FIGHTING THE CODE OR ANOTHER LARGE CASH OUTLAY. WE HAVE HAD SOME INCENDIARY LETTERS ON THIS POINT.

THE MINI STYLE ITSELF WAS THE PRODUCT OF ECONOMIC CONSIDERATIONS. AS I UNDERSTAND IT, THE TAXES IN ENGLAND WERE GREATER ON DRESSES FOR ADULTS THAN ON DRESSES FOR CHILDREN, AND SOME ADULT GIRLS STARTED THE MINI-FAD BY CHOOSING LITTLE GIRLS' DRESSES AS A MEANS OF PROTESTING THE TAX DIFFERENTIAL. IF THIS IS TRUE, I WOULDN'T BE SURPRISED IF SOME PLAINTIFF COMES UP WITH THE THEORY THAT THE WEARING OF A MINI SKIRT IS CONSTITUTIONALLY PROTECTED <u>POLITICAL PROTEST</u> ANALOGOUS TO THE BLACK ARMBANDS WORN BY THE TINKER CHILDREN RATHER THAN MERE EXPRESSION OF THE WEARER'S INDIVIDUALITY AS NOW CLAIMED.

TO ILLUSTRATE THE FACTOR OF CHANGING STYLES, I MIGHT CITE SOME EXAMPLES FROM THE PAST.

FIRST OF ALL, A DOUBLE-HEARSAY STORY THAT DURING THE EARLY 1940's FEMALE STUDENTS AT ST. OLAF's COLLEGE WERE PROHIBITED FROM WEARING PATENT LEATHER SHOES BECAUSE THEY WERE SO BRIGHT AND SHINY THEY MIRRORED THEIR UNDERGARMENTS.

IN THE CASE OF <u>PEARL PUGSLEY</u> v. <u>F. J. SELLMEYER, ET AL.</u>, 158 Ark. 247, 250 S.W. 538, 30 A.L.R. 1212 (1923),

THE SUPREME COURT OF ARKANSAS HAD BEFORE IT THE FOLLOWING RULE: "THE WEARING OF TRANSPARENT HOSIERY, LOW-NECKED DRESSES, OR ANY STYLE OF CLOTHING TENDING TOWARDS IMMODESTY OF DRESS, OR THE USE OF FACE PAINT OR COSMETICS, IS PROHIBITED."

PEARL PUGSLEY, AGE 18, INSISTED ON USING TALCUM POWDER, AND SHE WAS SUSPENDED FROM SCHOOL UNTIL SUCH TIME AS SHE CONSENTED TO COMPLY WITH THE RULE.

THE COURTS, INCLUDING THE SUPREME COURT, SUSTAINED THE BOARD ON THE GROUND THAT THEY SHOULD NOT CONSIDER THE WISDOM OF THE REGULATION IF WITHIN THE POWER OF THE BOARD AND THAT THE PRESUMPTION OF REASONABLENESS APPLIED. ONE JUDGE CONCURRED ON THE ODD GROUND THAT SINCE THE BOARD HAD RESCINDED THE RULE AFTER THE APPEAL WAS PERFECTED, THE CASE WAS MOOT. ANOTHER FARSIGHTED JUDGE DISSENTED CITING A PROVERB THAT "USELESS LAWS DIMINISH THE AUTHORITY OF NECESSARY ONES."

THE AUTHOR OF THE A.L.R. ANNOTATION COMMENTED THAT A CAREFUL SEARCH HAS FAILED TO DISCLOSE ANY OTHER CASE DEALING WITH THE REGULATION OF PUPIL APPEARANCE OTHER THAN CLOTHES AND REFERRED TO ANOTHER ANNOTATION ON THAT SUBJECT IN 18 A.L.R. 649. APPARENTLY, HAIR WAS NOT A CONCERN THEN.

THE CASE REPORTED AHEAD OF THAT ANNOTATION, INVOLVED THE FOLLOWING RULE PASSED ON SEPTEMBER 10, 1918, BY THE TRUSTEES OF WILKINSON COUNTY AGRICULTURAL HIGH SCHOOL:

> "IT WAS CARRIED THAT A UNIFORM OF KHAKI, AS PER SAMPLE SELECTED, BE ADOPTED FOR

HIGH SCHOOL BOYS, AND THAT ALL OF SAME BE REQUIRED TO WEAR THEM, WHICH SHALL CONSIST OF ONE COAT, TWO PAIRS OF PANTS, ONE PAIR OF LEGGINGS, TWO SHIRTS, ONE CAP, TWO BLACK TIES, AS A MINIMUM, AND TWO COATS, THREE PAIRS PANTS, TWO PAIRS LEGGINGS, THREE SHIRTS, ONE CAP AND THREE TIES AS A MAXIMUM." (Emphasis supplied)

WHEW--ALL OF THESE AT THE SAME TIME--BUT THAT'S NOT ALL--

"IT WAS ORDERED THAT THE PRINCIPAL BE INSTRUCTED TO ENFORCE THE UNIFORM REGULATIONS ON ALL STUDENTS WHEN VISITING PUBLIC PLACES WITHIN 5 MILES OF THE SCHOOL EVEN ON SATURDAYS AND SUNDAYS."

THE COURT SUSTAINED THE RULE AS TO ALL STUDENTS LIVING IN THE DORMITORY, BUT EXCEPTED STUDENTS LIVING AT HOME WHILE AT HOME AND UNDER PARENTAL CONTROL AND THIS WAS AFFIRMED BY THE MISSISSIPPI SUPREME COURT.

THE ANNOTATION ALSO REVEALED NO CASES DEALING WITH APPEARANCE OTHER THAN CLOTHING. SO WE WENT BACK FURTHER AND FOUND THE FOLLOWING GENERAL ORDER NUMBER 2 ISSUED BY THE UNITED STATES ARMY AT FORT RILEY, KANSAS, ON OCTOBER 25, 1842:

"1. MEMBERS OF THE COMMAND WILL WHEN SHOOTING BUFFALO ON THE PARADE GROUND, BE CAREFUL NOT TO FIRE IN DIRECTION OF THE COMMANDING OFFICER'S QUARTERS.

"2. THE TROOP OFFICER HAVING THE BEST TRAINED RE-MOUNT FOR THIS YEAR, WILL BE AWARDED ONE BARREL OF RYE WHISKEY.

"3. STUDENT OFFICERS WILL DISCONTINUE THE PRACTICE OF ROPING AND RIDING BUFFALOS.

"4. ATTENTION IS CALLED TO PARAGRAPH 107, UNIFORM ARMY REGULATIONS, IN WHICH IT PROVIDES THAT ALL OFFICERS SHALL WEAR BEARDS."

TIMES HAVE REALLY CHANGED. GENERAL ROBIN OLDS, ONE OF THE FEW TRIPLE ACES, AND NOW COMANDANT OF CADETS OF THE U. S. AIR FORCE ACADEMY, WAS "REQUESTED" TO SHAVE HIS HANDLE-BAR MOUSTACHE AS A CONDITION OF HIS PROMOTION TO THE RANK OF BRIGADIER GENERAL.

WE MIGHT GO BACK FURTHER--IT IS SAID IN A RECENT BIOGRAPHY OF THE DUKE OF WELLINGTON BY ELIZABETH LANGFORD THAT HE SPURNED DECORATIONS OF AUTHORITY AND ABHORRED POMP AND CEREMONY. IN THE DAYS OF POWDERED HAIR AND QUEUES TIED WITH RIBBONS, HE KEPT HIS HAIR UNPOWDERED AND CUT SHORT.

MY 15-YEAR-OLD SON HAS GONE BACK FURTHER FOR HIS MODEL. WITH A COAT OF MAIL, A DRESS, AND TWO WEEKS WITHOUT A HAIRCUT, HE WOULD LOOK STRIKINGLY LIKE PRINCE VALIANT. OTHERS WOULD LOOK LIKE KING ARTHUR, AND SOME EVEN WANT HIS PREROGATIVES.

MARK TWAIN ONCE SAID THAT IF EVERY DEGREE OF LATITUDE HAD ALL THE RIGHTS WHICH HE BELIEVED ENTITLED, HE WOULD BE THE EQUATOR.

II. <u>CONTEMPORARY DRESS CODES</u>.

DRESS CODES IN THE DENVER PUBLIC SCHOOL SYSTEM ARE GOVERNED BY DPS POLICY 1214A NEGOTIATED WITH THE DENVER CLASSROOM TEACHERS ASSOCIATION AND PROMULGATED BY THE BOARD IN 1965.

THIS POLICY WAS NEGOTIATED AS A RESULT OF DISCIPLINARY ACTION TAKEN BY A HIGH SCHOOL BASEBALL COACH IN SUSPENDING A NUMBER OF PLAYERS WHO PARTICIPATED IN A BEER DRINKING PARTY

AFTER THE END OF THE BASKETBALL SEASON AND BEFORE THE BASEBALL SEASON STARTED.

THE POLICY PROVIDES GENERAL POLICIES ON PUPIL CONDUCT, AND AS TO DRESS AND APPEARANCE, IT STATES:

> "(a). DRESS AND APPEARANCE
>
> PERSONAL APPEARANCE, CLEANLINESS, AND NEATNESS OF DRESS MUST MEET REASONABLE AND ACCEPTABLE STANDARDS. IN THE AREAS OF DRESS AND PERSONAL APPERANCE, THE DISRUPTIVE EFFECT OF EXTREMES IS THE REAL CONCERN OF THE SCHOOL. EACH SCHOOL SHOULD DEVELOP SUITABLE STANDARDS. RULES IN EACH SCHOOL SHOULD BE REVIEWED AS NEEDED."

ANOTHER SECTION PROVIDES FOR RULE DEVELOPMENT IN EACH SCHOOL:

> "2. RULE DEVELOPMENT IN THE SCHOOL
>
> a. SPECIFIC RULES FOR EACH SCHOOL SHALL BE DEVELOPED, WRITTEN, AND REVIEWED BY THE CERTIFICATED PERSONNEL IN CO-OPERATION WITH THE PRINCIPAL TO IMPLEMENT DENVER PUBLIC SCHOOLS POLICIES WITH RESPECT TO PUPIL CONDUCT. A COPY OF SUCH RULES SHALL BE SUPPLIED TO THE ASSISTANT SUPERINTENDENT FOR PERSONNEL SERVICES AND SHALL BE PROVIDED TO INTERESTED PERSONS OR ORGANIZATIONS UPON REQUEST.
>
> b. INDIVIDUAL TEACHERS OR TEACHERS IN A DEPARTMENT OR GRADE LEVEL GROUP MAY MAKE SPECIFIC RULES CONSISTENT WITH BUILDING RULES AND WITHIN THE FRAMEWORK OF THE POLICIES OF THE DENVER PUBLIC SCHOOLS.
>
> c. IF A SITUATION SHOULD ARISE IN WHICH THERE APPEARS TO BE NO APPLICABLE DENVER PUBLIC SCHOOLS POLICY OR SCHOOL RULE, THE

CERTIFICATED PERSONNEL WOULD BE EXPECTED TO EXERCISE REASONABLE AND PROFESSIONAL JUDGMENT. PURSUANT TO SUCH SITUATION, THE CERTIFICATED PERSONNEL IN THE BUILDING, IN COOPERATION WITH THE PRINCIPAL, HAS THE RESPONSIBILITY FOR CONSIDERING DEVELOPMENT OF APPLICABLE RULES.

d. RULES SHOULD BE KEPT TO A MINIMUM AND REVIEWED ANNUALLY OR AS NEEDED."

OF THE NINE SENIOR HIGH SCHOOLS IN THE DENVER SYSTEM, THREE HAVE NO DRESS CODE WHICH GOVERNS HAIR LENGTH FOR BOYS. THE OTHER SIX HAVE DRESS CODES REGULATING HAIR LENGTH AND ARE ENFORCING THEM.

III. HOW ARE DRESS CODES ENFORCED?

UNDER COLORADO STATUTES THE BOARD IS GIVEN POWER TO SUSPEND, EXPEL AND DENY ADMISSION FOR THE REMAINDER OF THE SCHOOL YEAR FOR "CONTINUED WILLFUL DISOBEDIENCE OR OPEN AND PERSISTENT DEFIANCE OF PROPER AUTHORITY" AMONG OTHER GROUNDS.

THE SUSPENSION POWER IS DELEGABLE AND HAS BEEN DELEGATED TO SCHOOL PRINCIPALS, BUT IS LIMITED TO FIVE SCHOOL DAYS. THE SUPERINTENDENT IS DELEGATED THE POWER TO EXTEND THE SUSPENSION FOR AN ADDITIONAL TEN SCHOOL DAYS AND THEN AN ADDITIONAL TEN SCHOOL DAYS, IF NECESSARY, TO PRESENT THE MATTER TO THE NEXT MEETING OF THE BOARD OF EDUCATION. THE BOARD HAS ALSO DELEGATED POWER TO EXPEL TO THE SUPERINTENDENT UNDER THE AUTHORITY OF THE STATUTE, AND HE MUST REPORT HIS ACTIONS TO THE NEXT MEETING OF THE BOARD. THEREAFTER, AN APPEAL MAY BE TAKEN BY THE EXPELLED PUPIL TO THE BOARD; AND THEN, IF NOT

SATISFIED, THE STUDENT MAY APPEAL TO THE JUVENILE COURT AND, FROM THERE, TO THE SUPREME COURT.

A STUDENT IS GENERALLY WARNED ABOUT DRESS CODE VIOLATIONS AND GIVEN AN OPPORTUNITY TO CONFORM. IF THAT DOES NOT WORK, HE IS SUSPENDED BY THE PRINCIPAL FOR FIVE DAYS DURING WHICH TIME A PARENT CONFERENCE IS ARRANGED. IF THE PARENT CONFERENCE DOES NOT PRODUCE RESULTS, THE SUPERINTENDENT IS REQUESTED TO EXTEND THE SUSPENSION AND A REQUEST FOR EXPULSION IS INITIATED BY THE PRINCIPAL. THAT REQUEST IS PROCESSED THROUGH THE DEPARTMENT OF PUPIL SERVICES AND IS HANDLED THERE INITIALLY BY THE SOCIAL WORK AND PSYCHOLOGICAL SERVICES PERSONNEL, THEN TO THE EXECUTIVE DIRECTOR, AND, FROM HIM, TO THE SUPERINTENDENT WITH RECOMMENDATIONS. IF THE SUPERINTENDENT EXCLUDES, A LETTER IS SENT TO THE PARENT ADVISING OF THE RIGHT TO APPEAL TO THE BOARD. RECENTLY, WE HAVE PROVIDED AN OPPORTUNITY FOR A HEARING BEFORE THE EXECUTIVE DIRECTOR OF PUPIL SERVICES. BY THE TIME THE MATTER HAS GOTTEN TO THIS HEARING STAGE, THE STUDENT IS GENERALLY REPRESENTED BY COUNSEL.

IN A RECENT CASE, A 19-YEAR-OLD JUNIOR AT DENVER'S SOUTH HIGH SCHOOL, JOHN BRICK, WAS SUSPENDED BY THE PRINCIPAL FOR VIOLATION OF THE HAIR LENGTH REGULATION AFTER REPEATED WARNINGS AND CONFERENCES WITH HIS MOTHER. AT THIS STAGE, HE OBTAINED COUNSEL FROM THE AMERICAN CIVIL LIBERTIES UNION. THEY REQUESTED A HEARING, WHICH WAS DENIED AS

PREMATURE BECAUSE NO EXPULSION PROCEEDINGS HAD BEEN INITIATED. THEREAFTER, THE SUPERINTENDENT EXPELLED THE BOY, AND HE FILED HIS COMPLAINT AND MOTION FOR TEMPORARY RESTRAINING ORDER WITH THE U. S. DISTRICT COURT FOR THE DISTRICT OF COLORADO; AND IT WAS ASSIGNED TO JUDGE DOYLE, THE SAME JUDGE WHO HAD ISSUED A PRELIMINARY INJUNCTION IMPLEMENTING A BUSSING PROGRAM OF RACIAL INTEGRATION LAST SUMMER.

WE OBJECTED TO ANY PROCEEDINGS IN THAT COURT ON THE BASIS OF FAILURE TO EXHAUST THE STATE ADMINISTRATIVE REMEDY OF APPEAL TO THE BOARD OF EDUCATION. THE COURT AGREED AND SET A HEARING FOR A LATER DATE. THE PLAINTIFF THEN FILED HIS APPEAL WITH THE SCHOOL BOARD; AND AFTER HEARING, THE BOARD AFFIRMED THE SUPERINTENDENT. THE MATTER WAS THEN SET FOR HEARING ON MOTION FOR PRELIMINARY INJUNCTION.

THE PLAINTIFF IN HIS COMPLAINT ALLEGED THE EXISTENCE OF THE SOUTH HIGH DRESS CODE REGULATION ON HAIR LENGTH WHICH PROVIDED

> ". . .HAIR MUST NOT BE IN THE EYES, OVER THE EARS, OR OVER THE COLLAR. SIDEBURNS CUT AT THE BOTTOM OF EAR."

HE ALLEGED THAT HE WORE HIS HAIR "LONG, FALLING BELOW HIS COLLAR: AND WHICH ALSO HAS A FEATURE KNOWN AS SIDEBURNS, WHICH FALL BELOW HIS EAR."

HE FURTHER ALLEGED THAT HE HAD LET HIS HAIR GROW LONG AS AN EXPRESSION OF HIS INDIVIDUALITY AND NOT AS A SIGN OF DISRESPECT FOR AUTHORITY.

IN HIS FIRST CLAIM HE ALLEGED THAT THE SOUTH HIGH REGULATION VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION IN THAT THE SUSPENSION IMPOSED A CRUEL AND UNUSUAL PUNISHMENT.

THE SECOND CLAIM ALLEGED THAT THE RULE VIOLATED THE FIRST AND FOURTEENTH AMENDMENTS IN THAT IT WAS ARBITRARY AND NOT REASONABLY RELATED TO A SUBSTANTIVE EVIL WHICH THE STATE HAD AUTHORITY TO PREVENT AND THAT IT HAD A CHILLING EFFECT ON FREEDOM OF SPEECH.

THE THIRD CLAIM ALLEGED A VIOLATION OF FREE SPEECH AND SELF EXPRESSION.

THE FOURTH CLAIM ALLEGED A VIOLATION OF EQUAL PROTECTION IN THAT OTHER HIGH SCHOOLS WITHIN THE DISTRICT PERMITTED HAIR STYLES SUCH AS THE PLAINTIFF'S.

THE FIFTH CLAIM ALLEGED VIOLATIONS OF THE PROCEDURES FOR SUSPENSION REQUIRED BY COLORADO STATE LAWS AND THUS VIOLATED THE FOURTEENTH AMENDMENT. (PROCEDURAL DUE PROCESS)

IN HIS PRAYER FOR RELIEF HE ASKED FOR PRELIMINARY AND PERMANENT INJUNCTIONS FROM ENFORCING THE RULE AND ASKED THAT IT BE DECLARED UNCONSTITUTIONAL AND VOID.

THE COURT HELD A HEARING ON THE MOTION FOR PRELIMINARY INJUNCTION WHICH RESULTED IN AN EVIDENTIARY HEARING ON THE MERITS DENIED THE INJUNCTION AND ISSUED HIS MEMORANDUM OPINION AND ORDER WHICH IS REPORTED AT 305 F.Supp. 1316.

JUDGE DOYLE WAS IMPRESSED BY THE TESTIMONY OF THE PRINCIPAL, THE ASSISTANT PRINCIPAL, AND TWO TEACHERS AS TO THE DEVELOPMENT AND REVIEW OF THE SOUTH HIGH DRESS CODE BY A COMMITTEE OF TWO PARENTS, TWO STUDENTS, TWO TEACHERS, AND TWO ADMINISTRATORS UNDER THE PROVISIONS OF THE DENVER PUBLIC SCHOOL POLICY PERMITTING LOCAL RULE DEVELOPMENT AND FOUND THAT IT WAS NOT PROMULGATED SOLELY AS AN EXPRESSION OF THE VIEWS OF THE ADMINISTRATION. IN OTHER WORDS HE FOUND THAT IT REPRESENTED THE STANDARDS AND TOLERANCES OF THAT PARTICULAR SCHOOL AND COMMUNITY.

OUR WITNESSES ALSO TESTIFIED THAT THERE HAD BEEN INSTANCES OF TWO OR THREE FIGHTS AND HARASSMENT BECAUSE OF LONG HAIR STYLES AND ONE INSTANCE WHERE A BOY WITH LONG HAIR REFUSED TO ATTEND SCHOOL BECAUSE OF STUDENT HARASSMENT. THERE WAS ALSO TESTIMONY OF DISTRACTIONS AND CLASS INTERRUPTIONS BECAUSE OF EXTREME HAIR STYLES. THE PLAINTIFF'S PHYSICAL EDUCATION TEACHER TESTIFIED THAT HE HAD WARNED HIM ABOUT THE SAFETY HAZARD CREATED BY HIS LONG HAIR WHICH WAS CONSTANTLY FALLING IN HIS EYES AND PREVENTED HIM FROM SEEING OTHER PLAYERS AND THE FOOTBALL.

BOTH SIDES ACKNOWLEDGED THAT THE PLAINTIFF, JOHN BRICK, WAS NOT A DISCIPLINE PROBLEM OR A DISRUPTIVE INFLUENCE.

THE COURT NOTED AT THE OUTSET THAT HIS JURISDICTION WAS STRICTLY LIMITED TO THE QUESTION OF WHETHER BRICK's RIGHTS,

GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES, HAVE BEEN OR ARE BEING VIOLATED. HE STATED THAT IT WAS NOT HIS FUNCTION TO PASS ON THE WISDOM OF THE REGULATION, NOR ACT AS A REVIEWING BODY FOR A SCHOOL BOARD DECISION TO DETERMINE WHETHER THERE HAS BEEN AN ABUSE OF DISCRETION.

PLAINTIFF CONTENDED THAT (1) HAIR LENGTH OR STYLE IS CONSTITUTIONALLY PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS, AND THAT DEFENDANTS HAVE FAILED TO SHOW AN OVERRIDING STATE INTEREST IN REGULATING IT; AND (2) THAT THE REGULATION OF HAIR LENGTH IS ON ITS FACE AN ARBITRARY INTERFERENCE WITH THE PLAINTIFF'S LIBERTY.

PLAINTIFF ASSERTED THAT THE LENGTH AND STYLE OF ONE'S HAIR IS IN ITSELF A FORM OF SYMBOLIC SPEECH PROTECTED BY THE FIRST AMENDMENT; THAT CONDUCT, LIKE WORDS, CAN BE AN EXPRESSION OR DRAMATIZATION OF A MORAL, SOCIOLOGICAL, POLITICAL, RELIGIOUS, OR IDEOLOGICAL VIEWPOINT, AND CITED TINKER v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DIST., 393 U.S. 503 (1969).

THE COURT STATED IN HIS OPINION:

"IT DOES NOT FOLLOW, HOWEVER, THAT ALL SUCH ACTION IS PROTECTED BY THE FIRST AMENDMENT. THE SUPREME COURT HAS LIMITED THE SCOPE OF THE SYMBOLIC SPEECH PROTECTION. VERY RECENTLY THE COURT CONSIDERED THE QUESTION IN A DRAFT CARD MUTILATION CASE AND HELD THAT THIS MUTILATION WAS NOT SYMBOLIC EXPRESSION. UNITED STATES v. O'BRIEN, 391 U.S. 367, 376 (1968), WHEREIN THE SUPREME COURT SAID IN PART:

> "'WE CANNOT ACCEPT THE VIEW THAT AN APPARENTLY LIMITLESS VARIETY OF CONDUCT CAN BE LABELED "SPEECH" WHENEVER THE PERSON ENGAGING IN THE CONDUCT INTENDS THEREBY TO EXPRESS AN IDEA.'

STILL QUOTING FROM JUDGE DOYLES OPINION:

"IN THE PRESENT CASE PLAINTIFF HAS ACKNOWLEDGED THAT HIS HAIR STYLE DOES NOT SYMBOLIZE ANY POLITICAL, RELIGIOUS, SOCIOLOGICAL OR MORAL POINT OF VIEW; STATING THAT THE LENGTH OF HIS HAIR WAS AN EXPRESSION OF HIS INDIVIDUALITY. SUCH SYMBOLIC EXPRESSIONS OF INDIVIDUALITY ARE NOT WITHIN THE FIRST AMENDMENT. See DAVIS v. FIRMENT, 269 F.Supp. 542 (E.D. La. 1967). IT PROTECTS EXPRESSIONS OF IDEAS AND POINTS OF VIEW WHICH MAKE A SIGNIFICANT CONTRIBUTION TO THE 'MARKETPLACE OF IDEAS.'

"THIS DOES NOT MEAN THOUGH THAT CONDUCT OF THE KIND HERE IN QUESTION DOES NOT HAVE ANY CONSTITUTIONAL PROTECTION. IT IS PROTECTED TO THE EXTENT THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS AN ARBITRARY DEPRIVATION OF LIBERTY. THIS RIGHT IS, HOWEVER, BOTH SUBSTANTIVELY AND PROCEDURALLY DISTINCT FROM THE PARAMOUNT RIGHT TO FREEDOM OF SPEECH. WHERE FIRST AMENDMENT RIGHTS ARE INVOLVED, THE FEDERAL COURTS ARE REQUIRED TO PROCEED SWIFTLY, See ZWICKLER v. KOOTA, 389 U.S. 241 (1967), AND TO GIVE THOROUGH AND EXHAUSTIVE CONSIDERATION TO ALL ISSUES PRESENTED. LEGISLATIVE POWER IN THIS AREA IS CIRCUMSCRIBED TO A MUCH GREATER DEGREE THAN IN THE AREA OF CONDUCT, AND COURTS REQUIRE THAT THE STATE COME FORWARD WITH EVIDENCE THAT SUCH A REGULATION IS NECESSITATED BY A COMPELLING STATE INTEREST BEFORE ITS

CONSTITUTIONALITY WILL BE SUSTAINED. NAACP v. BUTTON, 371 U.S. 415 (1963); BATES v. LITTLE ROCK, 361 U.S. 516 (1960).

"ON THE OTHER HAND, THE ROLE OF A FEDERAL COURT IN REVIEWING CLAIMS THAT STATE REGULATIONS OF LIBERTY VIOLATE SUBSTANTIVE DUE PROCESS IS RELATIVELY NARROW. 'LIBERTY IMPLIES THE ABSENCE OF ARBITRARY RESTRAINT, NOT IMMUNITY FROM REASONABLE REGULATIONS AND PROHIBITIONS IMPOSED IN THE INTERESTS OF THE COMMUNITY.' WEST COAST HOTEL CO. v. PARRISH, 300 U.S. 379, 392 (1937). THE ONLY QUESTIONS OPEN TO COURTS IN DETERMINING WHETHER SUCH A REGULATION VIOLATES SUBSTANTIVE DUE PROCESS ARE WHETHER THE REGULATION DEALS WITH A MATTER OF LEGITIMATE STATE INTEREST AND WHETHER IT IS A REASONABLE REGULATION.

"IN THE CASE AT BAR THE STATE IS ADVANCING A MOST IMPORTANT INTEREST, THAT OF PROVIDING FOR AND PROMOTING THE EDUCATION OF ITS CITIZENS. IN THIS REGARD, THOSE ACTIVITIES WHICH HAVE A DISRUPTIVE EFFECT ON THE LEARNING ATMOSPHERE IN PUBLIC SCHOOLS ARE PROPER SUBJECTS FOR REGULATION BY THE STATE AND ITS AUTHORIZED AGENTS. See, e.g., TINKER v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DIST., 393 U.S. 503 (1969); FERRELL v. DALLAS INDEPENDENT SCHOOL DIST., 392 F.2d 697 (5th Cir.), Cert. denied, 393 U.S. 856 (1968). IN THE PRESENT CASE THE EVIDENCE SHOWS THAT THE DRESS CODE PROVISION PERTAINING TO HAIR LENGTH WAS INTENDED TO PREVENT DISRUPTION AND DISTRACTION IN THE SCHOOL."

PLAINTIFF'S PRIMARY ARGUMENT WAS THAT SINCE HE, BRICK, WAS NOT A DISCIPLINE PROBLEM NOR A DISRUPTIVE INFLUENCE, THE RULE WAS UNREASONABLE AS TO HIM.

THE COURT CORRECTLY DISPOSED OF THAT ARGUMENT BY STATING THAT THE REASONABLENESS OF THE REGULATION MUST BE CONSIDERED IN THE LIGHT OF THE OVERALL SITUATION AT SOUTH HIGH AND THE EVIDENCE SHOWED A SUBSTANTIAL NEED FOR SUCH MEASURE.

PLAINTIFF'S CONTENTION THAT THE REGULATION VIOLATED HIS RIGHT TO EQUAL PROTECTION ON THE THEORY THAT HE COULD DEMAND TREATMENT EQUAL TO THAT OF STUDENTS AT THE THREE DENVER HIGH SCHOOLS WHICH DID NOT MAINTAIN DRESS CODES WAS GIVEN SHORT SHRIFT. THE COURT HELD THAT THIS LOCAL OPTION WHICH INVOLVED STUDENTS AND PARENTS IN THE RULE-MAKING PROCESS WAS AN EMINENTLY REASONABLE APPROACH TO THE PROBLEM OF STUDENT DRESS.

THIS CASE REPRESENTS THE MAJORITY VIEW IN THE COUNTRY. THE COURT RECOGNIZED A SPLIT OF AUTHORITY BUT HELD THAT THE BETTER REASONED VIEW WAS THAT ADOPTED IN FERRELL v. DALLAS INDEPENDENT SCHOOL DIST, 392 F.2d 697 (5th Cir.), cert. denied, 393 U.S. 856 (1968), AND FOLLOWED IN BOTH CREWS v. CLONES, 38 U.S.L.W. 2187 (S.D. Ind., Sept. 17, 1969) AND DAVIS v. FIRMENT, 269 F.Supp. 524 (E.D. La. 1967), aff'd. per curiam, 408 F.2d 1085 (5th Cir. 1969). IN FERRELL, THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HELD THAT A REGULATION OF HAIR LENGTH OF MALE STUDENTS IS CONSTITUTIONAL PROVIDED THE SCHOOL BOARD PRODUCES EVIDENCE OF THE DISTRACTIVE AND

DISRUPTIVE EFFECT WHICH UNUSUALLY LONG HAIR HAS ON THE LEARNING PROCESS AT THE PARTICULAR SCHOOL IN QUESTION. THE UNITED STATES SUPREME COURT DENIED CERTIORARI OVER JUSTICE DOUGLAS' LONE DISSENT.

THE OTHER LINE OF CASES ARE LED BY BREEN v. KAHL, 296 F.Supp. 702 (W.D. Wis. 1969), aff'd. by the Seventh Circuit Court of Appeals on December 3, 1969, 37 L.W. 2506, petition for certiorari filed March 3, 1970, 38 L.W. 3348, and RICHARDS v. THURSTON (D. Mass, Sept. 23, 1969) 38 L.W. 2186.

BREEN v. KAHL WAS DECIDED BY ANOTHER JUDGE DOYLE, THIS TIME IN THE WESTERN DISTRICT OF WISCONSIN.

JUDGE DOYLE HELD THAT THE WEARING OF A CERTAIN HAIR STYLE IS VIEWED AS A "COURSE OF CONDUCT" IN WHICH "SPEECH" AND "NON-SPEECH" ELEMENTS ARE COMBINED AND ONLY A "SUFFICIENTLY IMPORTANT GOVERNMENT INTEREST IN REGULATING THE NON-SPEECH ELEMENTS CAN JUSTIFY INCIDENTAL LIMITATIONS ON FIRST AMENDMENT FREEDOMS.

HE SAID THAT WHETHER THE WEARING OF HAIR A CERTAIN LENGTH OR WEARING A BEARD IS CONSTITUTIONALLY PROTECTED IS NOT A SIMPLE QUESTION. UNQUESTIONABLY IT IS AN EXPRESSION OF INDIVIDUALITY AND MAY BE AN EXPRESSION OF CULTURAL REVOLT ALTHOUGH THERE WAS NOTHING IN THE RECORD ON THE LATTER POINT. HE THEN STATED THAT IN HIS VIEW IT WAS UNNECESSARY TO DETERMINE THE QUESTION OF WHETHER IT WAS A CATEGORY OF "EXPRESSION" PROTECTED BY THE FIRST AMENDMENT. HE HELD THAT IT WAS CONSTITUTIONALLY PROTECTED EVEN THOUGH IT EXPRESSES NOTHING MORE

THAN INDIVIDUAL TASTE UNDER THE AUTHORITY OF GRISWOLD V. CONNECTICUT, THE U. S. SUPREME COURT CASE HOLDING THAT THE STATE REGULATION OF THE USE OF CONTRACEPTIVES BY A HUSBAND AND WIFE RUDELY INVADES A HIGHLY PROTECTED FREEDOM AND DOES NOT ENJOY THE USUAL PRESUMPTION OF CONSTITUTIONALITY.

UNDER THAT AUTHORITY, THE STATE'S INTEREST IN THE REGULATION MUST BE COMPELLING. THE COURT FOUND THAT THE SCHOOL AUTHORITIES HAD NOT MET THE "SUBSTANTIAL BURDEN OF JUSTIFICATION".

THE SEVENTH CIRCUIT COURT OF APPEALS WITH SENIOR JUDGE DUFFY DISSENTING AFFIRMED HOLDING THAT WHETHER THE RIGHT WAS WITHIN THE "PENUMBRAS" OF FIRST AMENDMENT FREEDOM OF SPEECH OR ENCOMPASSED WITHIN THE NINTH AMENDMENT AS AN "ADDITIONAL" FUNDAMENTAL RIGHT; IT CLEARLY EXISTS AND IS APPLICABLE TO THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. AS JUDGE DUFFY POINTED OUT IN HIS DISSENT, THE SUPREME COURT IN THE TINKER CASE DISTINGUISHED THE ARM BAND SITUATION FROM DRESS CODE CASES WHEN JUSTICE FORTAS STATED:

> "OUR PROBLEM INVOLVES DIRECT, PRIMARY FIRST AMENDMENT RIGHTS AKIN TO PURE SPEECH."

WE MAY GET A CLARIFICATION FROM THE U. S. SUPREME COURT IF CERTIORARI IS GRANTED.

THE CONSEQUENCE OF THESE RECENT FEDERAL CASES IN THIS AREA OF THE LAW IS MORE INFORMED SCHOOL ADMINISTRATION, AND GREAT RELAXATION OF THE FORMER RIGIDITY. PERHAPS THE PENDULUM HAS SWUNG TOO FAR BUT I WILL LEAVE THAT TO YOUR OWN

PERSONAL BIAS AFTER YOU HAVE HEARD THE STATEMENT ON PERSONAL APPEARANCE CONTAINED IN A BOOKLET ENTITLED "THE REASONABLE EXERCISE OF AUTHORITY" PUBLISHED BY THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS.

Personal Appearance

The courts have clearly warned that freedom of speech or expression is essential to the preservation of democracy and that this right can be exercised in ways other than talking or writing. From this generalization, it follows that *there should be no restriction on a student's hair style or his manner of dressing unless these present a "clear and present" danger to the student's health and safety, cause an interference with work, or create classroom or school disorder.*

A reasonable regulation concerning dress, hair style, and cleanliness will stress that such regulation is vital not only to the individual student but also to those with whom he shares a classroom or locker. Students should not wear clothing or hair styles that can be hazardous to them in their school activities such as shop, lab work, physical education, and art. Grooming and dress which prevent the student from doing his best work because of blocked vision or restricted movement should be discouraged as should be dress styles that create, or are likely to create, a disruption of classroom order. Articles of clothing that cause excessive maintenance problems—for example, cleats on boots, shoes that scratch floors, and trousers with metal rivets that scratch furniture—can be ruled unacceptable.

We strongly recommend that all actions relating to school dress codes be taken only after full participation in the decision-making process by students and other concerned parties.

THE ACLU POSITION IS STATED IN ITS RECENT PAMPHLET "ACADEMIC FREEDOM IN THE SECONDARY SCHOOLS."

PERSONAL APPEARANCE

The matter of acceptable dress and grooming is a frequent issue in schools. Education is too important to be granted or denied on the basis of standards of personal appearance. As long as a student's appearance does not, *in fact*, disrupt the educational process, or constitute a threat to safety, it should be no concern of the school.

Dress and personal adornment are forms of self-expression; the freedom of personal preference should be guaranteed along with other liberties. The reconciliation of the rights of the individual with the needs of the group was well expressed in the decision by California Superior Court Judge W. G. Watson in the case of Myers v. Arcata Union High School District. (1966)*

> The limits within which regulations can be made by the school are that there be some reasonable connection to school matters, deportment, discipline, etc., or to the health and safety of the students. . . . The Court has too high a regard for the school system . . . to think that they are aiming at uniformity or blind conformity as a means of achieving their stated goal in educating for responsible citizenship. . . . If there are to be some regulations, they must reasonably pertain to the health and safety of the students or to the orderly conduct of school business. In this regard, consideration should be given to what is really health and safety . . . and what is merely personal preference. Certainly, the school would be the first to concede that in a society as advanced as that in which we live there is room for many personal preferences and great care should be exercised insuring that what are mere personal preferences of one are not forced upon another for mere convenience since absolute uniformity among our citizens should be our last desire.

THERE ARE OTHER IMPORTANT PROBLEMS THAT ARE RELATED TO THIS THE ENFORCEMENT OF SCHOOL DRESS CODES WHICH ARE OUTSIDE THE SCOPE OF THIS LIMITED TOPIC AND THE MOST IMPORTANT IS PROCEDURAL DUE PROCESS IN SUSPENSION AND EXPULSION CASES. THERE IS SOME CASE LAW IN THIS AREA, MOST OF WHICH INVOLVES COLLEGE AND UNIVERSITY STUDENTS, BUT ONE IMPORTANT CASE INVOLVING THE PUBLIC SCHOOLS IS MADERA v. BOARD OF EDUCATION OF THE CITY OF NEW YORK, 267 F.Supp. 356, 386 F.2d 778, cert. den. 390 U.S. 1028.

ANOTHER RELATED AREA IS THE TINKER TYPE OF POLITICAL PROTEST AND WE HAVE A CASE WHICH IS ON THE TRAILING DOCKET OF THE FEDERAL DISTRICT COURT THIS MONTH INVOLVING A GROUP OF YOUNG HISPANO STUDENTS AT DENVER'S NORTH HIGH SCHOOL WHO INSISTED UPON WEARING BLACK BERETS IN SCHOOL AND WERE SUSPENDED WHEN THEY REFUSED TO REMOVE THEM AFTER BEING ADVISED BY ACLU ATTORNEYS.